



1 dismissed, pursuant to 28 U.S.C. § 2244(b) and Rule 4, because it is  
2 second or successive.

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4 **BACKGROUND**

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6 On April 4, 2000, Petitioner filed a habeas petition in this  
7 district that was assigned Case No. CV 00-4205-MMM (MAN) (the "First  
8 Action"). In the First Action petition, he raised four claims  
9 challenging his Three Strikes sentence on various grounds, a claim of  
10 prosecutorial misconduct, and claims that trial and appellate counsel  
11 performed ineffectively. The First Action petition was resolved on the  
12 merits, and habeas relief was denied by Judgment entered on May 3, 2003.  
13 Petitioner appealed to the United States Court of Appeals for the Ninth  
14 Circuit, and a certificate of appealability was denied on March 1, 2004  
15 (Case No. 03-56827).<sup>1</sup>

16  
17 On May 19, 2009, Petitioner filed an application in the Ninth  
18 Circuit for leave to file a second or successive petition (Case No. 09-  
19 71634). In his application, Petitioner raised the first and second  
20 claims alleged in the instant Petition, among other claims. On August  
21 18, 2009, the Ninth Circuit denied the application on the ground that  
22 Petitioner had failed to satisfy the requirements of 28 U.S.C. §  
23 2244(b)(2).

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27 <sup>1</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, the  
28 Court takes judicial notice of the files for Petitioner's actions filed  
in this district, as well as the dockets for the Ninth Circuit available  
electronically through the PACER system.

The instant Petition raises three claims attacking Petitioner's sentence on various grounds. Grounds One and Two assert that Petitioner's sentence violates the rule established in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), as that rule has been explicated in subsequent Supreme Court decisions. Ground Three asserts that Petitioner's sentence constitutes a "breach of contract," namely, a violation of his earlier plea agreement. (Petition Attachment.)

## DISCUSSION

State habeas petitioners generally may file only one federal habeas petition challenging a particular state conviction and/or sentence. *See, e.g.*, 28 U.S.C. § 2244(b)(1) (courts must dismiss a claim presented in a second or successive petition when that claim was presented in a prior petition) and § 2244(b)(2) (with several exceptions discussed *infra*, courts must dismiss a claim presented in a second or successive petition when that claim was not presented in a prior petition). “A habeas petition is second or successive . . . if it raises claims that were or could have been adjudicated on the merits” in an earlier Section 2254 petition. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009).

In those instances when Section 2244(b) provides a basis for pursuing a second or successive Section 2254 habeas petition (described *infra*), state habeas petitioners seeking relief in this district court must first obtain authorization from the Ninth Circuit before filing any such second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth Circuit “may authorize the filing of the second or successive [petition] only if it presents a claim not previously raised that satisfies one of

1 the two grounds articulated in § 2242(b)(2).” Burton v. Stewart, 549  
2 U.S. 147, 153, 127 S. Ct. 793, 796 (2007).

3  
4 In the First Action, Petitioner sought Section 2254 relief based on  
5 the same Conviction and related sentence challenged here, and his habeas  
6 claims attacking the Conviction and his sentence were resolved adversely  
7 to him on their merits. Accordingly, the current Petition is second or  
8 successive within the meaning of Section 2244(b).<sup>2</sup>

9  
10 As Petitioner has not obtained permission from the Ninth Circuit to  
11 bring a second or successive petition -- indeed, the Ninth Circuit has  
12 denied him leave to do so -- this Court lacks jurisdiction to consider  
13 the instant Petition. 28 U.S.C. § 2244(b); see also Burton, 549 U.S. at  
14 157, 127 S. Ct. at 799 (district court lacks jurisdiction to consider  
15 the merits of a second or successive petition absent prior authorization  
16 from the circuit court). Accordingly, IT IS ORDERED that: the Petition  
17 is DISMISSED; and Judgment shall be entered dismissing this action  
18 without prejudice.

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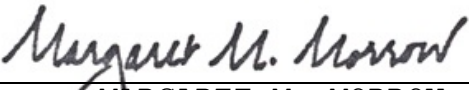
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28 <sup>2</sup> The instant Petition also appears to be substantially  
untimely.

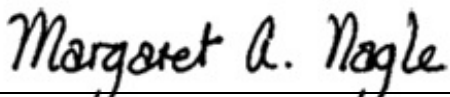
1 In addition, pursuant to Rule 11(a) of the Rules Governing Section  
2 2254 Cases in the United States District Courts, the Court has  
3 considered whether a certificate of appealability is warranted in this  
4 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-  
5 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a  
6 certificate of appealability is unwarranted, and thus, a certificate of  
7 appealability is DENIED.

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9 IT IS SO ORDERED.

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11 DATED: May 31, 2011

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14 MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE

15  
16 PRESENTED BY:

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18 MARGARET A. NAGLE  
19 UNITED STATES MAGISTRATE JUDGE  
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